No. 12030.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

EWELL TOOBERT,

Appellant,

vs.

TIGHE E. WOODS, Housing Expediter, Office of the Housing Expediter,

Appellee.

APPELLANT'S OPENING BRIEF.

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I.

BASIS OF JURISDICTION.

A. District Court.

This is an action brought by the United States Housing Expediter to secure an injunction restraining defendants from collecting rent in excess of the lawful amounts under the Housing and Rent Act of 1947 (U. S. C. A. Title 50 App. Sec. 1881 *et seq.*) and to require restitution of rents previously allegedly collected in violation of that act and the Emergency Price Control Act of 1942 (U. S. C. A. Title 50 App. Sec. 901 *et seq.*), all of which appears on the face of the amended complaint [Tr. pp. 2-7].

Under Section 205(c) of the Emergency Price Control Act of 1942, and Section 206 of the Housing and Rent Act of 1947 jurisdiction of this action is expressly conferred on the District Court.

B. Court of Appeals.

The judgment rendered by the District Court [Tr. pp. 31-33] is clearly a final judgment, and jurisdiction is therefore conferred on the Court of Appeals to review the same by virtue of Section 128(a) of the Judicial Code (U. S. C. A. Title 28, Sec. 225) which provides that the Courts of Appeals shall have appellate jurisdiction to review by appeal final decisions in the district courts.

II.
STATEMENT OF THE CASE.

During the period from June 2, 1945, until September 5, 1947, the defendant and appellant Ewell Toobert and his wife Marcella Toobert (who was not made a party to this action) owned the property described by street and number as 422, 422¼, 422½, 422¾, 424 lower floor, 424 upper front and 424 upper rear, East 15th Street, Los Angeles, California [Tr. p. 132]. The evidence establishes without contradiction, and there is no dispute, that as to five of these seven units the actual tenant-occupants during varying portions of the stated period paid as rent sums in excess of the lawful maximum rents under the Emergency Price Control Act of 1942 and the Housing and Rent Act of 1947. So far as this defendant and appellant Ewell Toobert is concerned, there was

not in the District Court and there is not before this court any controversy as to:

(a) The maximum rents on the five units in question; or

(b) The amounts paid by the tenant-occupants of these five units in excess of the maximum rents, as set forth in the judgment [Tr. p. 32] and totalling $2208.00.

The evidence does not show whether the remaining two units were or were not subject to maximum rents, or if so the amount of the maximum rents on these units; consequently, there is no way of ascertaining what the total maximum rent on the entire premises was. Such excessive rents were all paid to defendant Jack Hammond or defendant William H. Hall, the latter being a mere collecting agent for Hammond. At all of the times in question, Hammond was in complete management and control of the premises, first as a vendee under a contract to buy the premises from Toobert, and later upon the rescission of this contract as the tenant of Toobert. No part of the excessive rents was ever paid to or received by the appellant Toobert.

The case at bar is one brought by the Federal Housing Expediter to require, in the words of the prayer of the amended complaint,

> "That the defendant be ordered and directed to tender to all available tenants as are entitled thereto a refund of all amounts in excess of the maximum rents established by the Emergency Price Control Act of 1942, as amended, and Regulations issued

thereunder, and/or the Housing and Rent Act of 1947, and Regulations issued thereunder, which were received by the defendant, his agents, servants, employees and attorneys from said persons as rent for the use and occupancy of the housing accommodations described in the complaint, since the date maximum rents were established therefore by (4) said Acts and said Regulations." [Tr. p. 5.]

In addition to an order of restitution as thus prayed for, the plaintiff sought an injunction to restrain defendants from future violations of the Housing and Rent Act of 1947. It will be observed that neither of the statutes in question expressly authorizes an action by the Housing Expediter to compel a landlord to restore to the tenant rents collected in excess of the legal maximum; but in view of the majority decision of the United States Supreme Court in *Porter v. Warner Holding Co.,* 328 U. S. 395, 66 S. C. R. 1086, 90 L. Ed. 1332, the existence of such a remedy appears no longer open to question.

The appellant contends on this appeal that he did not, directly or indirectly, through an agent or otherwise, demand, collect or receive any of these excessive rents, that he was at no time the landlord of the tenants who paid these excessive rents, and that he cannot be called upon to refund that which he never received. In presenting this contention from the record, it will be stated in several different ways, but the basic issue remains the same: Was or was not the appellant Toobert the landlord of these overcharged tenants?

III.

SPECIFICATION OF ERRORS RELIED UPON.

1. That material Findings of Fact are not supported by the evidence as follows:

(a) Finding No. 5, to the effect that from July 13, 1945, to September 1, 1947, the defendant Ewell Toobert was the landlord of the premises designated as 422, 422¼, 422¾, 424 upper front, and 424 upper rear, East 15th Street, Los Angeles, California, within the meaning of said term as defined in the Federal Rent Regulations;

(b) Findings 7, 9, 10, 11, 13, 14, 15, 17, and 18, insofar as these findings relate to Ewell Toobert, and find that he was the landlord of the persons named respectively as rent-payers in said findings, and find that he demanded and received certain sums respectively as rent of the respective premises described in said findings.

2. That Finding No. 5, above referred to, is erroneous in that it is against the clear weight of the evidence.

3. That Findings 7, 9, 10, 11, 13, 14, 15, 17 and 18 are erroneous in that they are, and each of them is, against the clear weight of the evidence insofar as they relate to Ewell Toobert.

4. That the court erred in finding that the defendant Ewell Toobert demanded or received any over-maximum rents.

5. That the court erred in admitting hearsay evidence against the defendant Toobert over his objection.

IV.
ARGUMENT.

SUMMARY. Appellant's argument can best be summarized by emphasizing that the overall issue in this case is the sufficiency of the evidence to justify the findings to the effect that Ewell Toobert was a landlord of the tenant-occupants and the findings that over-maximum rents were demanded and received by Toobert. These facts are the very crux of plaintiff's case, and we expect to convince the court that the record is completely and utterly lacking of evidence in support of such findings.

Specification of Error No. 1.

We contend that Finding No. 5 [Tr. p. 25], reading as follows:

> "5. That for the period of time extending from July 13, 1945, to and including September 1, 1947, said defendants, Ewell Toobert and Jack Hammond, were the landlords within the meaning of said term as defined in Section 13(a)(8) of the Rent Regulation for Housing, and Section 1 of the Controlled Housing Rent Regulation, of the housing accommodations designated as 422, 422¼, 422¾, 424 upper front and 424 upper rear, East 15th Street, Los Angeles, California, and located within said Defense Rental Area, said accommodations being subject to said (31) Rent Regulation for Housing and said Controlled Housing and Rent Regulation." [Tr. p. 25.]

is wholly unsupported by the evidence. The term landlord is defined in identical language in the two regulations referred to in said Findings, as follows:

> "Landlord includes an owner, lessor, sublessor, assignee or other person receiving or entitled to receive rent for the use or occupancy of any housing accommodations, or an agent of any of the foregoing."

And we contend that Findings 7, 9, 10, 11, 13, 14, 15, 17 and 18, of which we quote only Finding 7, as follows:

> "7. That for the period extending from October 26, 1945, to August 26, 1947, exclusive of the period extending from July 1, 1946, to July 26, 1946, inclusive, defendants Ewell Toobert and Jack Hammond, as landlords, demanded and received from Ida Mae Patrick the sum of $40.00 per month as rent for the use and occupancy of said housing accommodations located at 422 East 15th Street, Los Angeles, California; whereas, the maximum legal rent for said housing accommodations was the sum of $18.00 per month, amounting to a total overcharge of $462.00." [Tr. p. 25.]

because the remainder are identical therewith except for the substitution of other names, dates, amounts and street numbers, and each of them is wholly unsupported by the evidence. The lack of evidentiary support for Finding No. 5 and the group of Findings 7-18 will be discussed together, for the reason that the subject matter is completely inseparable.

Each of the overcharged tenants testified. Each of them testified that he rented his apartment from Hammond and made his rental agreement with Hammond:

Ida Mae Patrick—Tr. pp. 49-50;
Jeffery Gassaway—Tr. p. 70;
Pearl Hildreth—Tr. p. 71-72;
Ernestine Coleman—Tr. pp. 75-76;
Berdie Mae White—Tr. pp. 81-83;
Ethel Davis—Tr. p. 94.

Each of them testified that he paid his rent to Hammond:

Ida Mae Patrick—Tr. p. 54, pp. 63-64;
Jeffery Gassaway—Tr. p. 70;
Pearl Hildreth—Tr. p. 71-72;
Ernestine Coleman—Tr. pp. 75-77;
Berdie Mae White—Tr. p. 84;
Ethel Davis—Tr. p. 96.

(There are six tenants, but only five apartments involved, Hildreth and Gassaway having occupied the same apartment at different periods [Tr. pp. 69-71].)

Most of them testified that he paid his rent at times to William H. Hall:

Ida Mae Patrick—Tr. p. 54;
Pearl Hildreth—Tr. p. 72;
Ernestine Coleman—Tr. pp. 76-77;
Berdie Mae White—Tr. pp. 85-86;
Ethel Davis—Tr. p. 96;

But William H. Hall was only the collecting agent for Hammond, and delivery of the money to Hall was merely payment to Hammond:

[Hammond's testimony, Tr. p. 109.]

And one tenant paid some rent to a Mrs. Dodson as a collector for Hammond and on Hammond's instructions [Testimony of Ernestine Coleman, Tr. pp. 77-78].

Four of these tenants testified to having had conversations with Mr. Toobert at one time or another, and we here quote in its entirety all of the testimony relating to such conversations:

PEARL HILDRETH:

Direct Examination.

"Q. Have you ever seen Mr. Toobert before? A. Yes; I have.

Q. Will you describe the circumstances under which you first met Mr. Toobert? A. I had a fire in my home in 1946 on October 5th. Mr. Toobert knocked on the door and said he was the owner of the property. He came down with the insurance fellow to see about the damage that was done. I asked Mr. Toobert if he would fix the windows on the house. He had already had the house painted. He said he would get around to that later. I told him I was paying $40.00 a month; I thought that ought to be enough; that he should fix the windows, which the windows haven't been fixed until yet.

Q. What did he say, if anything? A. Well, he and the insurance fellows began to talk, and he told me that he would have the windows fixed.

Q. Do you recall anything else that was said during that conversation? A. No; no more than he asked me and the fellow, the insurance fellow, do he think the place looked all right, and that is how we got around to the conversation about the windows and that was practically all." [Tr. pp. 72-73.]

Cross-Examination.

"Q. Mrs. Hildreth, you have seen Mr. Toobert, you say [45], only once before? A. No. I saw Mr. Toobert, he was at the place two or three times while it was being fixed.

Q. This was following the damages which were caused by fire? A. That is right.

Q. And he came down there with the insurance adjuster? A. And said he was the owner.

Q. And examined the portions of the building which had been damaged in that fire, is that right? A. That is right. Also, he came by to see the people that was working for him. He had working for him two fellows that done the work in the house.

Q. You mean this was in repair of some damages caused by the fire? A. That is right." [Tr. p. 74.]

ERNESTINE COLEMAN:

Direct Examination.

"Q. Have you ever seen Mr. Toobert? [49] A. Several times.

Q. Under what circumstances have you seen Mr. Toobert? A. Well, only once he came to the house and looked around, you know, the yard, that he was going to repair the places, and then several more times he was in the court, you know, just looking over the property and houses and things, and I only come in contact with him once, myself, to talk to him.

Q. What was said at that time? A. He said he was just looking the place over; he was going to repair them and he was looking at my porch at the time, and he was on the steps, and he said, 'They need a repair.' And he was going to repair the places." [Tr. p. 78.]

Cross-Examination.

"Q. When did you talk to Mr. Toobert? A. I don't know. It was in the summer months in—

Q. What year? A. In 1946.

Q. The summer of 1946? A. Yes.

Q. Who else was present? A. No one. [51]

Q. Was that the first time you ever saw him? A. No; that was not the first time I saw him.

Q. The first time you ever talked to him? A. Yes; that was the first time and the only time.

Q. Did you introduce yourself to him? A. No; I didn't. I saw him. He was out around in the yard, looking over the place, and I went out. He said, 'Well, I am just looking around to see what repair needs done on the houses.' " [Tr. pp. 79-80.]

BERDIE MAE WHITE:

Direct Examination.

"Q. Have you ever seen Mr. Toobert before today? A. Yes, I surely have.

Q. On approximately how many occasions have you seen Mr. Toobert? A. Oh, I have seen him on several occasions but I have only had a conversation with him twice.

Q. On each time you have seen him where has that been? [62] A. 424 East 15th Street and 422 East 15th Street.

Q. Has he been there at the premises? A. Yes, sir.

Q. By himself or with someone? A. He was by himself.

Q. You stated on two occasions you had a conversation with him? A. Yes, sir.

Q. Do you recall when your first conversation with Mr. Toobert was? A. Yes, sir. It was at 422 East 15th Street in the home of Mrs. Patrick. He came in to use the telephone.

Q. When was this? A. That was about in—let's see; about April of 1946.

Q. You say he came in to use the phone? A. Yes, sir.

Q. And what was said? A. Well, Mrs. Patrick was complaining about her screens being torn down, and she said, she remarked to him that we was paying $40.00 and he should fix the screen or something like that. And he said, well, he would see about it; he was going to fix up all the houses later on.

Q. Is that essentially all that you can recall at this time? A. That is all I can recall there at her home.

Q. You say you had another conversation? A. Yes, sir; I did.

Q. Where did that take place? A. In my home, the upper front at 424 East 15th Street.

Q. And in reference to time when did that occur? A. That must have been—I think it was about in March of 1946.

Q. Was that before this other conversation? A. Yes, sir; that was before this other conversation.

Q. The one you had with Mr. Toobert at your home was before this one? A. Yes, sir.

Q. At Mrs. Patrick's home? A. Yes, sir.

Q. Who was present at that time with Mr. Toobert? A. My husband and myself.

Q. Do you recall what Mr. Toobert said at that time, if anything? A. Yes sir. He came in and

looked at the house. We was trying to paint it. We had bought some Kemtone and was going over the walls. And I remarked to him, 'It seems like you all could paint the house, we are paying so much rent, paying $40.00.' And he said, 'Well, I am going to fix them all up.' He looked around. He wanted to see how they looked. He came out on the porch and in the kitchen [64] and examined them. I think he went next door.

Q. Did he just happen along or did he come in with any express purpose? Did he state why he came? A. Well, he said he wanted to see what kind of condition they were in, if I make no mistake." [Tr. pp. 88-90.]

ETHEL DAVIS:

Direct Examination.

"Q. Mrs. Davis, have you ever seen Mr. Toobert before today? A. Yes; I have.

Q. Do you recall on how many occasions you have seen him? A. A couple of times.

Q. And on each time where did that take place? A. Well, I seen him downstairs. I didn't have a conversation with him downstairs, but in October in 1946.

Mr. Downing: I can't hear, please.

A. In October, 1946, he came upstairs and he says, 'I am the owner and I want to look the place over. I am going to have some repair work done on it.' And I says to him, to Mr. Toobert, 'In the kitchen the back glass is broken out.' And I said, 'My apartment is supposed to be furnished but it is unfurnished.' And I said, 'Which you know that we are paying $40.00 a month.' He said, 'Well, I can't do anything about that,' he said, 'but if you

want to buy the property,' he say, 'I will give you a nice bargain on it.'

Q. Is that the gist of the conversation as you recall it at this time? A. Sure. I think he gave me his address at 1417, I think it is, Kelman Avenue and he gave me his name.

Q. Kelman, K-e-l-m-a-n? A. And he told me if I wanted to buy the property to see him at that address." [Tr. p. 102.]

The foregoing is absolutely all that the record contains of any direct dealings, relationship, transactions or conversations between Toobert on the one hand and the tenant-occupants on the other.

It will hardly be necessary to cite authorities to the effect that the burden of proof rests on the plaintiff, nor to do more than state the fundamental principle that the relationship of landlord and tenant originates in contract, express or implied. It needs no argument to demonstrate that the foregoing testimony falls far short of proving Toobert the landlord of these tenants, or that he demanded or received any over-ceiling rents.

That Toobert occasionally visited the premises, was interested in their condition, was concerned about the fire damage and spoke also of making other repairs, is indicative of ownership or at least some interest in the premises, but it hardly proves, even *prima facie,* the landlord-tenant relationship between himself and the occupants. It is equally consistent with other theories, such as the correct one that he was the original lessor and Hammond the sub-lessor. However, we will dispense with further argument on this point, because on the trial appellant's

counsel himself expressly conceded the insufficiency of this evidence when on two different occasions he said:

> "Mr. Hirst: Your Honor, I will admit that we have to tie up the defendant Toobert with the defendant Hammond." [Tr. p. 62.]

and

> "Mr. Hirst: As I stated before, I understand there is to be a link-up there with Mr. Toobert." [Tr. p. 82.]

Appellant has diligently searched the remainder of the record and we can find no trace of any such "tie-up" or "link-up." All further evidence offered, on the part of all parties, consists of the testimony of Jack Hammond (called both as an adverse witness and on his own behalf) and Ewell Toobert.

Mr. Hammond, called by the plaintiff as an adverse witness, testified, under interrogation by the court, as follows:

> "The Court: Were you renting these apartments to these different people here yourself?
>
> The Witness: Yes, sir.
>
> The Court: You were renting them yourself?
>
> The Witness: Yes, sir.
>
> The Court: What did the other defendant have to do with it?
>
> The Witness: Owner. Who?
>
> The Court: Mr. Toobert. [84]
>
> The Witness: Toobert, yes; he is the owner. I don't know, frankly speaking, if he is or not. I was renting from him.
>
> The Court: You were renting from him and renting to these others, is that it?

The Witness: Yes. First, Mr. Toobert decided to sell me the place.

The Court: After that you rented, you said, to these other people?

The Witness: Yes, sir." [Tr. p. 107.]

The witness at first stated that he paid Mr. Toobert $18.00 from the monthly rent and gave it to Mr. Toobert [Tr. p. 105], but shortly thereafter corrected this and made clear that he paid Mr. Toobert a flat sum, irrespective of what he collected from the tenants:

"Q. When you were renting these places how much money did you turn over to Mr. Toobert in the aggregate? Did you turn it over depending on how much you took in or did you turn over a flat sum every month? A. A flat sum every month.

Q. How much was that? A. When I first taken that, I turned over $150.00 to him every month for one year." [Tr. p. 111.]

The witness testified that an oral contract existed whereby Toobert agreed to sell him the property, and that for the first 12 months he paid $150.00 per month to Toobert pursuant to this oral contract [Tr. p. 114]; and that at the end of this time the oral contract was rescinded and he rented the premises from Toobert and paid $125.00 per month as rent [Tr. p. 118]; that he never rendered to Toobert any statement of rents collected or expenses paid out upon the property [Tr. p. 118]; that he was required to pay certain utility bills of the tenants [p. 114] and that he signed up for the water bills himself and paid them himself [Tr. pp. 118-119]; that the operational repairs, such as plumbing, were done by him at his own expense [Tr. p. 108]; he said "I just

ran out of money for the plumbers going up there." [Tr. p. 108.]

The defendant Toobert testified in substance that he and his wife acquired title to the property June 2, 1945 [Tr. p. 129], that about a month later he and Jack Hammond entered into an oral contract whereby he agreed to sell and Hammond agreed to buy the property for $17,500, payable $150.00 per month [Tr. p. 130], that the property was to be taken in the name of Octavia Hammond (Jack Hammond's wife), and that a contract of sale between himself and Octavia Hammond was drawn up but never signed [Tr. p. 130], that Jack Hammond maintained the $150.00 monthly payments to him for one year [Tr. p. 131]; that at that time he (Toobert) requested Jack Hammond to pay the insurance, and that Hammond replied that he was not going through with the purchase, whereupon the contract of sale was rescinded and he rented the premises to Jack Hammond for $125.00 per month [Tr. pp. 130-131], and that thereafter Hammond paid him $125.00 per month [Tr. p. 131]; that Hammond never rendered to him any statements covering rent collections on the property [Tr. p. 131]; that he at no time signed up for or ever paid the water bills which were the landlord's obligation [Tr. pp. 131-132].

The fire insurance policy issued January 22, 1946, covering the entire premises was produced, and a portion of it read in evidence showing that the insured under the policy were Octavia Hammond, Ewell Toobert and Marcella Toobert [Tr. pp. 132-33].

Now the appellant has not thus recapitulated the testimony of Toobert and Hammond because any need rests on us to prove affirmatively that Toobert was not the landlord (*i. e.,* the landlord of the complaining occupants).

The plaintiff has the laboring oar. In this, as in any other civil action, the burden of proof rests on him. It is incumbent on him to establish by substantial evidence the ultimate facts recited in the findings under attack. We have cited the testimony of Toobert and of Hammond so that it might be examined to ascertain if there can be there found that necessary proof of agency, admittedly, in the words of appellee's counsel, completely lacking up to that point; we have not cited it because any duty rests upon us to prove that Toobert was Hammond's vendor or Hammond's landlord. We are not trying to prove a case; we are trying to demonstrate that the plaintiff has not proved one.

Again we say, the question answers itself. There is nowhere in the testimony of Toobert or Hammond any shred or scintilla of evidence to the effect that Hammond was acting for Toobert, or authorized to act for him, in his (Hammond's) dealings with the tenant-occupants or his collection of rents from them. The promised "link-up" is still missing.

Two of the fundamental rights of a landlord—any landlord—are to sue his tenant for past due rent and to evict his tenant if the rent is unpaid. Measured by these criteria, where does Toobert stand with respect to the tenant occupants on the facts as shown by this record? If Berdie Mae White failed to pay her rent when due, could Toobert have sued her for the money or maintained eviction proceedings against her? If so, on what facts? It is for the appellee to answer these questions.

We leave this portion of the argument with the citation of *Ricks v. Corak,* 65 Fed. Supp. 960 (East Dist. Penna.), which, while only the decision of the District Court, presents facts virtually parallel to the actual facts as shown by the record in the instant case; and where the court holds squarely that in the absence of substantial evidence to show agency between the original landlord and the sublessor, that the original landlord is not liable for excessive rents paid by the tenant-occupants to the sublessor.

Specifications of Error Nos. 2 and 3.

We contend that Finding No. 5 and Findings Nos. 7, 9, 10, 11, 13, 14, 15, 17 and 18, so far as they relate to Ewell Toobert, being the same findings attacked under specification of error No. 1, and set out in full above at pages 6 and 7 of this brief, are against the clear weight of the evidence and should be set aside.

It is the law that the Circuit Court of Appeals in equity cases is not limited to the mere question whether there is any substantial evidence to support the findings, but may set them aside if against the clear weight of the evidence.

State Farm Mut. Automobile Ins. Co. v. Bonacci,
111 F. 2d 412.

Under this point we refer to our previous argument, and suggest that if in some manner or other there is any competent evidence to be extracted from this record to support these findings, that nevertheless the evidence preponderates so overwhelmingly against the truth of these findings that it is the duty of the appellate court to set them aside as against the clear weight of the evidence.

Specification of Error No. 4.

We contend that the court erred in finding that the defendant Ewell Toobert demanded or received any over-maximum rents.

Such a finding was made by the court and is found in Findings numbers 7, 9, 10, 11, 13, 14, 15, 17 and 18 [Tr. pp. 25-29]. These are the same findings, except No. 5, heretofore attacked; and under this specification we wish to make a different approach.

At this point we will look somewhat more fully into the nature of the cause of action under which judgment has been rendered against the appellant. We are here concerned with both the original rent control law, the Emergency Price Control Act of 1942, and its successor, the Housing and Rent Act of 1947, because excessive rents were here collected during the periods of active operation of both statutes. The original law authorized expressly two distinct civil remedies against the landlord for the recovery of rents unlawfully paid:

(a) An action by the tenant himself; or

(b) Under certain circumstances, an action by the Price Administrator.

Emergency Price Control Act of 1942, Sec. 205(e); U. S. C. A. Title 50, Sec. 925.

while the Housing and Rent Act of 1947 authorizes only the action by the tenant. (U. S. C. A. Title 50, Sec. 1895.) But this is neither an action by the tenants nor an action by the Price Administrator to recover the statutory penalty. In the words of the majority in *Porter v. Warner Holding Co.* (*supra*), 328 U. S. 395, 66 S. C. R. 1086, 90 L. Ed. 1332, "It may be considered as an equit-

able adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief" (p. 399). The relief sought, and the judgment here rendered, is not an ordinary judgment for the recovery of money, but a mandatory injunction directing the defendants to return monies which they have unconscionably collected; in the language, again, of the *Porter* case, it is "a decree compelling one to disgorge profits, rents or property acquired in violation of the Emergency Price Control Act" (p. 398). And the basis for such a decree lies not in any express statutory authorization, for there is none, but in the "inherent equitable powers of the District Court" (p. 398). See also,

Creedon v. Randolph, 165 F. 2d 918; and

Blood v. Fleming, 161 F. 2d 292,

where emphasis is laid on the purely equitable character of the relief sought.

It abundantly appears from a reading of the cases cited that this is a purely equitable action, and that any restitution order must be grounded on the familiar equitable principle of unjust enrichment. Now, then, we have a judgment of restitution against Toobert, and it becomes pertinent to inquire by what monies he has been enriched, and whether the plaintiff has established that any of that enrichment was unjust.

Toobert has been enriched by the receipt of $150.00 per month from Hammond for 12 months, from July,

1945, to July, 1946, and by the receipt of $125.00 per month from August, 1946, to September, 1947 [Tr. pp. 130-132]. But those sums were paid for the entire premises, namely 422, 422¼, 422½, 422¾, 424 lower floor, 424 upper front, and 424 upper rear, seven units in all [Tr. p. 113]. It has been found (and this finding we do not question) that the maximum rents on five of these units aggregated $82.00 per month [Findings of Fact, Tr. pp. 23-29]. But no evidence was offered and no finding was made as to the maximum rent (if any) on the remaining two units, namely, 422½ and 424 lower floor. The former consisted of a separate dwelling house, and the latter was a five room apartment where Hammond lived and also operated a club [Tr. p. 113]. Toobert has been unjustly enriched only if the amount he received exceeded the maximum rent. There is, however, nothing to show what the total maximum rent was on the whole seven units collectively. It therefore does not appear whether the sum, first, of $150.00 per month, and later, the sum of $125.00 per month, did or did not exceed the aggregate maximum rental on the whole seven apartments.

Since under the theory of this action, the defendant is to be ordered to return only that which he unlawfully received, then surely, if this appellant is under any theory to be held liable, the case should be remanded for further evidence to establish the remainder of the maximum rents, so as to ascertain in what amount, if any, Toobert's receipts exceeded the lawful amount.

Specification of Error No. 5.

The court erred in admitting hearsay evidence against the defendant Toobert over his objection.

While Ida Mae Patrick, one of the tenant occupants, was on the witness stand the plaintiff attempted to elicit from her the substance of a telephone conversation between her and Jack Hammond which took place some six months after the last over-ceiling rent was paid. The record shows the following:

> "Q. By Mr. Hirst: I will ask the witness, then, to state what conversation took place over the telephone with Mr. Hammond on this occasion that you refer to. What was the conversation?
>
> The Court: Now, wait a minute. Do not answer until counsel have an opportunity to object.
>
> Mr. Downing: To which we make objection on behalf of the defendant Toobert that the conversation is as to him pure hearsay, not binding upon him. Those are the objections.
>
> Mr. Hirst: Your Honor, I will admit that we have to tie up the defendant Toobert with the defendant Hammond.
>
> The Court: I will allow it, with such tying up, as you refer to it. If not, it would be hearsay. With that understanding, go ahead. You have got a situation here and I have got to receive the evidence the best way I can, and then we will size it up at the last as to what is admissible.
>
> Q. By Mr. Hirst: What was the conversation, Mrs. Patrick? What did you say and what did he say? A. Well, he called over the phone and said that he would not be able to pick the rent up any more; that Mr. Toobert would pick up the rent himself hereafter. And I don't remember what day that

was or what date it was, but I know it was in the last four or five weeks ago.

Q. Was that all that was said? [31] A. Yes.

Mr. Hirst: That is all, Mrs. Patrick." [Tr. pp. 61-62.]

That such conversation was, as to Toobert, hearsay (although competent as to Hammond) hardly seems open to question; indeed, the trial court expressly, and counsel for the plaintiff impliedly, conceded it to be such. The testimony objected to is of little consequence, and we make this point merely to point out that even though the testimony objected to is unimportant, it is nevertheless incompetent and should be wholly disregarded.

Conclusion.

We feel that the court erred in rendering judgment against Toobert when the record is devoid of evidence against him, and that it should be reversed.

Respectfully submitted,

George W. Downing, Jr.,
Attorney for Appellant.